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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 574

THE RESCUE ARMY, A CORPORATION, CHARLES T. MURDOCK,

Appellants,

vs.

THE MUNICIPAL COURT OF THE CITY OF LOS ANGELES

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

STATEMENT AS TO JURISDICTION

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Counsel for Appellants.

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SUPREME COURT OF THE UNITED STATES

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No. 574

THE RESCUE ARMY, A CORPORATION, AND CHARLES T. MURDOCK,

Appellants,

vs.

THE MUNICIPAL COURT OF THE CITY OF LOS ANGELES,

Appellee

JURISDICTIONAL STATEMENT

Jurisdiction of the United States Supreme Court to entertain appeal in this case is sustained by the Fourteenth Amendment to the Constitution of the United States, and Section 237(a) of the Judicial Code, 28 U. S. C. A. Section 344(a) and (b), 8 F. C. A., Title 28, Sec. 344(a).

The State statute involved in this case is Ordinance No. 77,000 of the incorporated City of Los Angeles, California, which ordinance is entitled "Charities." It contains nineteen sections, some of which have many subdivisions; the nineteenth, entitled "Pawnbrokers, Secondhand Dealers" is not involved in this case.

Through the provisions of the first eighteen sections, being numbered 24.01 to 24.18, inclusive, it purports to

regulate all public solicitations of donations for charitable purposes and makes it unlawful to solicit without strict compliance with said provisions, violation of which prohibition is made punishable as a penal offense.

The Rescue Army is an incorporated, non-profit religious organization and has solicitors who secure donations of money and goods to be used exclusively in its religious activities which consist of preaching the Gospel in its churches, ministering to the sick and needy for the promotion of the Christian faith, maintaining missions and tent meetings and the distribution of religious tracts and other similar literature, and to these ends, engaging and supporting ministers and evangelists.

The appellant, Murdock, at all times involved, has been a duly ordained officer of the Rescue Army who is required by it to devote his entire time and efforts to its said religious activities, and to solicit donations personally and through others, are among his duties.

Appellants are charged with violations of Section 44.09 and 44.12. Section 44.09 reads:

> "(a) No person shall solicit any contribution for any purpose by means of any box or receptacle, upon any public street, sidewalk or way, or in any public park or in any publicly owned or controlled place, except by the express written permission of the Board.
>
> "(b) No person shall solicit any charitable contribution, or any contribution for any real or purported charitable purpose, by means of any box or receptacle in any place immediately abutting upon any public sidewalk or way, or in any place of business open to the public, or in any room, hallway, corridor, lobby or entranceway, or other place open to or accessible to the public, or in any place of public resort, without first filing with the Department a "notice of intention" as required by Sec. 44.05, and every person so soliciting must in all other respects comply with the provisions of this Article."

Section 44.12 provides:

> "No person shall solicit any contributions unless he exhibits an Information Card provided for in Sec. 44.03 of this Article and reads it to the person solicited or presents it to said person for his perusal, allowing him sufficient opportunity to read same, before accepting any contribution so solicited."

Said sections above quoted are not severable from other sections, or from the whole body of said ordinance, but are interdependent therewith and derive their claim to legality solely upon the fact that they are parts of the general plan of a purported regulatory law enacted in the exercise of the police power.

Issuance to a solicitor of the "Information Card" mentioned in Section 44.12 is made essential by Section 44.03, but in order to secure an Information Card a would-be solicitor must first file a "notice of intention to solicit" as provided in Section 44.05.

Whether Section 44.12 is void as a prior restraint on the exercise of freedom of religion, as applied herein, directly involves Sections 44.03 and 44.05, and it is necessary to set them forth to reveal their full import.

Section 44.05 reads:

> "No person shall solicit, nor shall any officer or member of any association authorize any person to solicit, any contribution for any charitable purpose unless within the fiscal year of the City in which such solicitation is made and at least ten (10) days prior to the beginning of such solicitation, there shall have been filed with the Department, on a form furnished by said Department, by such person or association upon whose behalf the solicitation is made, written Notice of Intention to solicit such contribution, which notice shall contain complete information as follows:
>
> "(a) The purpose of the solicitation and use of the contribution to be solicited;

"(b) A specific statement, supported by reasons and, if available, figures, showing the need for the contribution proposed to be solicited;

"(c) The character of such solicitation and how it will be made or conducted;

"(d) The expenses of the solicitation, including salaries and other items, if any, regardless of from what funds such expenses are payable;

"(e) What portion of the contributions collected as a result of the solicitation will remain available for application to the specific purposes declared in the Notice of Intention as the object of the solicitation;

"(f) A specific statement of all contributions collected or received by such person or association within the calendar year immediately preceding the filing of such Notice of Intention. The expenditures or use made of such contributions, together with the names and addresses of all persons or associations receiving salaries, wages, compensation, commissions or emoluments from such contributions, and the respective amounts thereof;

"(g) The names and addresses of the officers and directors of any such association for which the solicitation is proposed to be made;

"(h) A copy of the resolution, if any, of any such association authorizing such solicitation, certified to as a true and correct copy of the original of such resolution by the officer of such association having charge of the records thereof;

"(i) A statement that the signers of such Notice have read and are familiar with the provisions of this Article and will require all solicitors engaged in such solicitation to read and be familiar with all sections of this Article prior to making any such solicitation."

Section 44.03 provides:

"The department shall have the following powers:

"(a) To investigate the allegations of Notice of Intention, or any statement or reports;

"(b) To have access to and inspect and make copies of all books, records and papers of such person, by or on whose behalf any solicitation is made;

"(c) To investigate at any time the methods of making or conducting any such solicitation;

"(d) To issue to all solicitors Information Cards which cards shall show:

"(1) That same is issued as information for the public and is not an endorsement;

"(2) The Board may, pursuant to Ordinance No. 34982, omit above provision and state that they endorse such charitable association;

"(3) The pertinent facts set forth in Notice of Intention required under Section 44.05 of this Article;

"(4) Any additional information obtained as shall in the opinion of the Board be of assistance to the public to determine the nature and worthiness of the purpose for which the solicitation is made;

"(e) To charge a fee for supplying Information Cards, at the rate of four cents per card; provided that when more than twenty-five cards are issued at one time for the same solicitation, the fee for all such cards in excess of twenty-five shall be one cent per card."

Section 44.06 contains an additional requirement concerning the subject matter of both Sections 44.03 and 44.05, as follows:

"There shall be filed with the Department with such Notice of Intention a statement of any agreement made with any agent, solicitor, promoter, manager or conductor of such solicitation, together with a copy of each agreement which may be in writing. Within twenty-four hours after any change in any such agreement or the making of any new or further agreement, a true copy of such change or agreement if in writing, or if not, written details thereof shall be filed with the

Department. Whenever, in the opinion of the Board, the Notice of Intention filed with the Department does not disclose sufficient information for the public concerning the facts hereinabove required to be stated in such Notice or concerning the person or association making such solicitation or on whose behalf such solicitation is made, then, upon the request of said Department, there shall be filed, in writing, within forty-eight (48) hours after such request, such additional information as may be required by said Board upon the foregoing subjects. Provided, however, that the Board, for good cause, may extend the time for filing such additional information. The Notice of Intention and such additional information, if requested, shall be signed by such person intending to make such solicitation, or if by or for any association, by at least two officers of such association and shall be open to the inspection of the public."

Section 44.16 provides that if the solicitation is "solely" for evangelical, missionary or religious purposes the provisions of the Ordinance (except Sections 44.01 and 44.04) shall not apply, "however, that in any case where it shall come to the attention of the Board that any solicitation has been or is being or intended to be made for evangelical, missionary or religious purposes but in such manner as in the opinion of the Board is calculated to give or may give the impression to the person or persons solicited in any such solicitation or to the public that the purpose of such solicitation is either in whole or in part charitable, then the Board, if in its opinion the public interest will be subserved thereby, shall investigate the matter of such solicitation and give publicity to its findings thereon in such manner as it may deem best to advise the public of the facts of the case."

Section 44.15 in part reads:

"No person shall solicit any contribution for any charitable purpose unless such person shall tender to

each person making such contribution a written receipt signed by the solicitor which contains in addition to a description of the amount and kind of the contribution, substantially the following matters:

"(a) The name of the association, if any, in whose name or upon whose behalf the solicitation is made.

"(b) A statement as to whether the contribution solicited is to be applied for the general purposes of such association, if any, or for specific purposes, and if for specific purposes the nature thereof shall be clearly stated.

"(c) A statement that the Information Card, issued by the Department, was presented to the person making the contribution for his perusal prior to receipt by the solicitor of the contribution receipted for."

Other provisions in especially close relation to Section 44.09 are:

1. Section 44.01 creates a special class of solicitors called "promoters", distinguished from other solicitors, only, in that they receive "consideration", for soliciting.

2. The promoter-solicitor must first apply for a "license" (Sec. 44.19 (1)). He must make application in writing giving any information "required by the Board" and on three specified items pertaining to the plan and purpose of the solicitation and the association conducting it. (44.19(2));

Applicant must post a bond in the sum of $2,000 to insure against theft, etc. (44.19(3)); He must pay a "fee" of $25.00 to the Board (44.19(4)); He is then examined and awaits the result of an investigation by the Board as to his affairs and his "character and reputation." If the Board is satisfied of applicant's "financial responsibility" and other specified matters it shall issue the license; "otherwise, the Board shall deny the application." (44.19(5)).

3. "No person who is a paid officer or a social service agency endorsed by the Board of Social Service Commissioners, shall be considered a promoter within the meaning of this Article (Sec. 44.01)."

The judgment and decree sought to be reviewed by application for allowance of appeal was rendered on the 26th day of June, 1946, and became final on July 24th 1946, a petition for rehearing having been duly filed by plaintiffs and petitioners, which petition was by said State Supreme Court, on July 24th, 1946, denied.

Statement of Grounds upon Which It Is Contended the Questions Involved Are Substantial

The case involves the validity of said entire "Charities" Ordinance, and especially of Sections 44.09 and 44.12 thereof, it having been claimed by petitioners, the Rescue Army and Charles T. Murdock, that said sections, standing alone, and together with all others in said Ordinance on their face infringe petitioners' right of religious liberty and the free exercise thereof, and their right to dispense charity in the exercise as incidental thereto, and are thus violative of the First and Fourteenth Amendments to the Constitution of the United States; in that certain provisions of said Ordinance and the entire plan thereof as applied to religious organizations or to charitable associations, and especially as applied to petitioners and their activities, constitute prohibited prior restraints upon the exercise of said right, and that certain provisions of the Ordinance as applied to petitioners and to all religious organizations similarly situated are arbitrary, unreasonable and unduly burdensome, and that certain of them are discriminatory and deny the equal protection of said enactments, empowering respondents to grant special immunities and privileges to some and to deny the same to others, and are thus

especially prejudicial to petitioners if enforced discriminatorily and arbitrarily against them as said City and its Board and officers have done and seek and threaten to continue to do.

Among the provisions of said Ordinance which are and have been challenged by petitioners as invalid and infringements of all clauses and guaranties of the 14th Amendment to the Federal Constitution is Section 44.09 which empowers the "Board to grant or deny permission to solicit in public places anywhere in Los Angeles for any purpose, including for religion and charity, and provides that "no person shall solicit any contribution except with the written permission of the Board," but provides *no* standard or rule to guide or govern the Board's action. In requiring a religious organization to secure permission to solicit for religious activities it violates the right of freedom of religion; in empowering said Board to discriminate, it violates the equal protection of the laws clause, and since the Board is authorized to deny permission capriciously, unreasonably or for evil purposes it is obnoxious to the due process clause of said 14th amendment.

Throughout the progress of this proceeding petitioners have claimed and now assert that, among others, the following are void for the same reasons as are above specified as to Section 44.09:

Section 44.01, in its provision that no person who is a paid officer of a social service agency "endorsed" by said Board "shall be considered a promoter," when conjoined with the authorization in Section 44.03 of the Board to "endorse" any charitable association, and no rule or standard is provided to govern the Board in making its decision; the Board being given arbitrary power to act may relieve those endorsed from subjection to numerous time-consuming, burdensome, unreasonable requirements, such as

paying a license fee and posting a bond, while the unendorsed remain under compulsion to comply with them.

Also, among the Sections fatally inflicted with said unconstitutional violations is Section 44.12 which may be made inapplicable to a given solicitor by Board endorsement and so infringes the equal protection of the laws and the due process clauses of said 14th amendment, and in requiring the solicitor to have and read the voluminous and unreasonable Information Card to every person solicited, petitioners have claimed and do claim that it violates the right of freedom of religion.

Petitioners claim and have claimed that the provisions which render applicable to religious organizations requirements compelling their solicitors and colporteurs to secure a permit or license, to pay a fee, and post a bond, to provide unlimited information upon unspecified subjects, to await without time or subject matter limit, upon investigations by said Board, and numerous other similar demands before being allowed to solicit, if any part, however small, of the anticipated donations, are not "purely" and "solely" for religion are arbitrary, unreasonable, discriminatory against religious organizations and solicitors and each constitutes a violation of the exercise of the right of freedom of religion. The most offensive of such sections creating said violations are: 44.05, 44.06 and 44.18.

Also, petitioners assert that the sections and provisions of the Ordinance involved, including 44.09 and 44.12 are so related and interdependent that they form a void and unconstitutional plan whose validity must be considered and determined in order that complete or substantial relief be rendered.

The State Court of Last Resort, the Supreme Court of the State of California, affirmed the judgment and decree of the trial court, after denial without opinion of plaintiff's

petition by the District Court of Appeal of said State and said Supreme Court held and adjudged that said Sections 44.09 and 44.12 of the Ordinance 77,000 of said City of Los Angeles, and certain other closely related sections of said ordinances are each constitutional and valid and are not violative of the 14th amendment to the Federal Constitution upon any of the grounds asserted by petitioners; and in upholding the validity of Section 44.12, which expressly requires every solicitor to "in all respects comply with the provisions of this Article" said decision and judgment upheld the constitutionality of said Ordinance (Article 4, Section 4 of the Ordinance involved) as a legal entity and each provision thereof as against all challenges on constitutional grounds presented by petitioners.

Some of the cases which, it is believed, sustain jurisdiction and bring the instant case within the applicable jurisdictional and statutory provisions are:

Cantwell v. *Connecticut*, 310 U. S. 296, 84 L. Ed. 1213;
Murdock v. *Pennsylvania*, 319 U. S. 105, 87 L. Ed. 1292;
Zucht v. *King*, 260 U. S. 174, 176, 67 L. Ed. 194.

Nature of the Case and Rulings of the Court Which Are Believed Bring the Case Within Jurisdictional Provisions to Sustain Jurisdiction.

The action involved was commenced by the Rescue Army and Charles T. Murdock by a Petition for a Writ of Prohibition to restrain the Municipal Court of the City of Los Angeles from proceeding to try petitioner Murdock for alleged violations of Sections 44.09 and 44.12 of Ordinance Number 77,000 of said City. The respondent court was about to try said cause for the third time, a conviction having been had in each of two previous trials, which in each instance, had been reversed on appeal, by the Superior Court of California in and for the County of Los Angeles.

The complaint or petition for said Writ relates the previous trials, convictions and reversals and avers that the Rescue Army is a non-profit incorporated religious organization, of which Murdock is an officer whose official duties occupy his full time, and that one of said duties is soliciting funds from the public to be used in its religious activities, including its charities (Petition for Writ, Pages 1 and 2); it is further averred that said Ordinance and Sections 44.09 and 44.12 and other sections thereof are, separately and as a whole, violative of the right of religious freedom of petitioners and of all religious organizations similarly situated, both on their face, and as construed and applied by said city and by its Department of Social Service, and the Commissioners and Secretary thereof in that said Ordinance and sections create and constitute numerous prior restraints upon the exercise of said right, as guaranteed by the 14th and the 1st Amendments to the Federal Constitution (Petition, Pages 4 to 7).

Said petition alleged that "said Sections 44.09 and 44.12 are not, and neither of them is, severable from other sections of said Ordinance, or from the whole body thereof, but are dependent upon and interdependent with other sections of said Ordinance, and derive their pretended legality solely from the fact that they are a part of a purported regulatory law enacted in the exercise of governmental power" (Petition, Page 8), and said petition contains the following averments:

> "That at all times herein mentioned there was and now is in effect in the City of Los Angeles an ordinance, entitled the 'Charities and Relief' Ordinance, numbered 77,000, a copy of which said ordinance is attached hereto and marked Exhibit A, and made a part of this petition by reference, which said Ordinance purports to and by its provisions does prohibit the exercise of the right of religious freedom by church and other religious organizations through the solicita-

tion of money, or anything of value, or by the sale thereof, for religious purposes except upon the payment of a license tax or fee to said city, and the issuance of a license or permit by said city to so solicit; that said ordinance forbids and penalizes said solicitations by a class of solicitors which it designates as 'Promoters' unless and until said 'Promoters' shall have paid to said city a license tax or fee of $25.00 and have posted a bond in the sum of $2,000.00, and said ordinance likewise requires of another class of solicitors a payment of a license tax or fee and the posting of a bond in the sum of $500.00 with the Board of Social Service Commissioners of said City, and said ordinance further forbids any 'promoter' or other 'solicitor' to solicit without having first obtained a permit or license so to do from said city, * * *." (Petition, Page 4.)

"That section 44.16 of said Ordinance purports to exempt from the requirements of the payment of said license taxes or fees and the posting of said bonds and the obtaining of said licenses or permits those solicitors whose solicitations are 'purely' for 'evangelical, missionary or religious purposes'; but petitioners aver that said city and its boards, officers and other agents have at all times herein mentioned construed and applied, and now construe and apply said last named provision to exclude from said exemption all solicitors who do not entirely donate their services and if any portion, however small, of the collections made by said solicitors are ~~to be or are~~ used for charity even though such charity is an essential activity and an integral part of a missionary, evangelical or religious activity of a church or other religious organization, petitioners aver that each, every and all of the provisions described in this paragraph and in paragraph V of this petition is and they all constitute a prior restraint upon the exercise of the right of religion and as such violate Amendments One and Fourteen of the Constitution of the United States."

"That said Ordinance as construed and applied by said city, its officers, boards and other agents, classifies all religious activities of churches, religious associations and other religious organizations as charities and as being for charitable purposes, and thereby subjects said religious organizations to all of the said licensing and permit requirements of said ordinance; that said ordinance provides that said city, through its Department of Social Service may 'approve' such 'charitable associations' as it deems are entitled to such approval and thereby exempt them and their promoters and solicitors from the provisions of said ordinance hereinbefore described and from the necessities of time-consuming delays in investigations and other procedural requirements of said ordinance, and said ordinance, section 44.09 thereof, provides that said Board of Social Service Commissioners may by 'express written permission' allow any person to solicit contributions by means of a box or receptacle, upon any street, sidewalk or way, or in any public park, or in any publicly owned or controlled place, although without such 'express written permission,' all persons are forbidden by said section to so solicit as aforesaid;

"Petitioners aver that said last described provision of said section 44.09 and of said provision authorizing said Department of Social Service to approve such charitable association as it deems entitled thereto, arbitrarily grants and permits to be granted privileges and immunities to a portion of a class while denying the same to others and that said provisions authorize the granting of special privileges to certain persons which are not given to others similarly situated, and are thus violative of Article I, section 21 of the Constitution of California and of the equal protection of the laws clause of the Fourteenth Amendment to the Federal Constitution." (Petition for Writ, Pages 5 to 7.)

Defendant and Respondent's Demurrer and Answer

The defendant court, represented by the City Attorney of said city, filed an answer and also demurred to the complaint generally and upon numerous specific grounds and filed "Points and Authorities" containing such argument as to be a brief, in support of the demurrer, in which it is contended among other matters, that the ordinance "constitutes a valid exercise of the police power." "A means of registration of persons engaged in soliciting donations • • •"; that it "does not confer power, arbitrary or otherwise, upon the Board to deny to anyone the right to solicit for charitable purposes;" that "Insofar as it confers power on the Board to waive compliance with certain regulations, such action must be taken in the exercise of a wise discretion;" that "if the exception found in Section 44.16 of the Los Angeles Municipal Code be considered as establishing a religious test and for that reason invalid, such fact does not invalidate the remainder of the ordinance" and "the Ordinance as thus construed would still come within the limits of control of religious organizations as outlined in the various decisions of the United States Supreme Court." (Points and Authorities, Br. With Dem., Pages 19, 20.)

Said argument on behalf of the Municipal Court declares that Sections 44.01 to 44.15 are "regulatory in their nature"; that although nothing in the Ordinance authorizes "the Board to issue or deny a permit to solicit", a refusal "to issue such cards (permits) would be overcome by a Writ of Mandate," and it is asserted that the provisions of Section XVIII pertaining to "promoters" (one class of solicitors) are not shown by the petition to be applicable to either of the plaintiffs, but that such provisions do not "infringe upon religious liberty." (Ibid. Pages 14, 15.)

The answer admits the allegations of the petition con-

cerning the prior trials of the criminal case involved and that the said City and its City Attorney and the Municipal Court will proceed to try the case again unless restrained by the process sought; that the City of Los Angeles and its City Attorney claim the right to compel plaintiffs to obey all of the provisions of the Ordinance involved and have threatened to arrest Murdock and all other solicitors of the Rescue Army who solicit contributions of any kind for it, or who otherwise violate provisions of said Ordinance. The answer does not deny the allegations of the petition regarding the nature and official purposes of the Rescue Army or Murdock's relationship to it and his duties as an officer and employee thereof, including the duty to personally solicit donations and to do so through others.

The answer denies that the Ordinance prohibits the exercise of the right of freedom of religion by religious organizations, except upon payment of a license tax or fee and the issuance of a license or permit by said city; denies that said ordinance requires that the class of solicitors called "promoters" are required to pay a license fee of $25.00 and post a bond of $2,000.00 and to secure a license to be permitted to solicit in the City of Los Angeles; denies that as construed and applied by said City and its Boards and officers, Section 44.16 of the Ordinance and any of the Sections which require of solicitors or promoters a fee or a license tax or furnishing a bond and securing a permit or a license to solicit for religous organizations, constitute prior restraints upon the exercise of the right of religious freedom or violate Amendments One or Fourteen of the Constitution of the United States, and, generally, said Answer denies each and all of the averments of the complaint by which a particular section, or the Ordinance as a whole, are challenged by the petition as violations of the said 14th Amendment or any of its clauses; the answer also

alleges that Sections 44.02 to 44.15 of the Ordinance involved "do not apply to persons who solicit donations which are to be used solely for religious, missionary or evangelical purposes." (Answer, Pages 3 and 4.)

Petitioner's Reply to Respondent's "Brief" and Answer

While this proceeding was pending before the State Supreme Court, the Petitioners, Murdock and the Rescue Army, filed a "Reply to Respondent's Answer and Brief" in which it is pointed out that Respondent's Points and Authorities (brief), accompanying its demurrer, in contending that petitioners would be acquitted at a trial if Murdock was soliciting *solely* for religious, evangelical or missionary purposes and, hence, the writ should not issue, overlooked the proposition that the ordinance gives the city's department authority to decide whether or not any activity is purely religious and that it was held in *In re Darte,* 172 Cal. 47, that an activity conducted by the Salvation Army where the proceeds from the sale of donated articles were used for both purely religious purposes and for its charities is within the protection of the 14th Amendment and that the City of Los Angeles had no power to require that the purpose be solely for religion or to require a permit to entitle a solicitor for such organization to solicit. (Petitioners' Reply to Respondent's Answer and Brief, Pages 1a to 3.)

Also, it was asserted that a statement in said Points and Authorities that all that the Ordinance requires of a would-be solicitor to entitle him to solicit is that he file a "statement setting forth certain information," is positively not true, because before soliciting an "Information Card" (permit) must be issued and to secure such permit involves compliance with numerous other sections, and the Ordinance in effect allows the City's Department of Social Service

and its Secretary to arbitrarily refuse to issue the same; also, in response to respondent's claims in said brief that the license fees required by the Ordinance are merely for purposes of caring for identification and registration expense and that the Ordinance is a mere registration and identification act as held lawful in *Murdock* v. *Pennsylvania*, 87 L. Ed. 1292, and *Cantwell* v. *Connecticut*, 310 U. S. 296, 84 L. Ed. 1213, petitioners quote from these decisions, and thereby purport to show that such claims are unfounded and that the City Ordinance involved and its licensing and other requirements, under said last named cases, violate the right of freedom of religion and its exercise, by creating many unreasonable and burdensome prior restraints. (Ibid. Pages 2-5.)

To show the nature of Petitioner's reply and the issues argued, in this behalf, a portion thereof is quoted as follows:

> "In the Cantwell *v.* Connecticut decision, 'slight inconvenience' only is permitted. In Murdock *v.* Pennsylvania, it is made plain that the inconvenience and delay must be so limited as not to constitute a restraint upon an itinerant preacher.
>
> "Of course any enforced delay or any burden is a previous restraint upon the exercise of the Constitution-created right to engage in charitable or religious activities.
>
> "If we picture an itinerant preacher under compulsion to comply with Ordinance 77,000 it is obvious that he would become a permanent citizen and a qualified voter before the restraints *in advance* would be removed, but few itinerant preachers or solicitors could pay a $25 license fee and pay for a $2000 bond for a few days solicitation to support his preaching activities in city after city throughout the country. The proposition is preposterous to describe this license or permit fee as 'nominal' and 'regulatory.' The Murdock opinion forbids. Anent the itinerant preacher, it says:

"'Itinerant evangelists moving throughout a state or from state to state would feel immediately the cumulative effect of such ordinances as they become fashionable.'

"Upon what reasonable pretext could a *registration* system consume from ten days to an unlimited period for *investigation* and securing additional information?

"A registration system is what its name implies, and it is so treated in both the Cantwell and Murdock decisions. Its object is to place in the hands of authorities the 'names, addresses and other marks of identification' of the solicitor which could ordinarily be supplied in five minutes. The Cantwell opinion adds to these items, the authority of the solicitor to represent the cause for which he intends to solicit. A letter or other evidence of such authority, if an association is represented, would be handed to the Board's secretary when the identification data is supplied or immediately thereafter.

"No, a 'registration system' has nothing in common as to its procedure, substance or object with the flat license tax of $25 imposed in 'Our Charities and Relief Ordinance.'" (Ibid. Pages 10, 11.)

Answering assertions that the Ordinance does not confer power, "arbitrary or otherwise, upon the Board to deny anyone the right to solicit for charitable purposes" and that Sections 44.09, 44.15 and 44.16 especially do not confer such power or violate the equal protection of the law clause of said 14th Amendment, petitioners insisted that said sections must be construed as the petition alleges and in that behalf points out other interrelated sections of said ordinance which, it is argued, infringe the equal protection of the laws clause of said 14th Amendment, to-wit, Section 44.03, subdivision 2, which authorizes the Board to arbitrarily endorse certain associations, denominated "any social service agency" and to render it scot-free of the prior restraints imposed upon all others similarly situated,

among the restraints named being compulsion of applying for a permit or license, submitting to unlimited investigations and exhibiting or reading voluminous information cards to those solicited; also the definition of the term "promoter" in Section 44.01 is claimed to create an arbitrary, oppressive and unreasonable class discrimination in that it makes all solicitors subject to classification as promoters by the Board and at the same time empowers the Board to relieve, without restrictive standards, the promoter of an "endorsed" social service agency, of all provisions applicable to other promoters, among which are paying a license fee of $25.00 to solicit and posting of a bond of $2,000. (*Ibid.* Pages 7-9).

Petitioners also point out that under said Ordinance, Charles T. Murdock is a promoter as well as a solicitor and is subject to said discriminatory provisions of Section 44.01, and finally said Reply to respondent's answer and brief contends that said city has no power to make any solicitation for a religious purpose or for charity as does Section 44.16 by limiting to "purely evangelical, missionary and religious purposes," solicitations which are exempt from the provisions of the ordinance. (*Ibid.* Pages 4-7).

Petition for Hearing by the Supreme Court

After the denial by the State District Court of Appeal of the petition, petitioners duly petitioned the Supreme Court to hear their petition, which petition and the alternative Writ were granted as prayed.

In said Petition for Hearing, it was represented that the matters involved concern a large number of people who compose the Rescue Army or give it aid and support and all other organizations of similar character, their members and adherents, and a copy of the petition of the Writ of Prohibition was set forth in full, and a copy

of the Ordinance involved was appended as "Exhibit A."

Points and Authorities accompanied the Petition for Hearing. Those which support petitioner's challenge to the City Ordinance involved and its provision are the following:

"Constitutional Rights Relied Upon

"A State Cannot Impose a Charge for the Exercise of the Right of Religion Which Privilege and Right is Granted by the Federal Constitution.

Murdock *v.* Penn., 87 L. Ed. 1292;
Cantwell *v.* Connecticut, 310 U. S. 296;
In re Darte, 172 Cal. 47.

"The Right to Engage in Religious or Charitable Activities is not the Subject of State Regulation, although a Mere Registration-Identification Ordinance May be Valid Where Only a Nominal Fee is Charged.

Murdock *v.* Pennsylvania, supra;
Cantwell *v.* Connecticut, supra.

"*The Fact That a Solicitor Receives Some Profit From His Work Cannot Transform Evangelism Into a Commercial Enterprise.*

Murdock *v.* Pennsylvania, supra;
In re Darte, supra.

"To Impose Prior Restraints on The Colporteurs or Solicitors for Religious Groups is to Take From Them a Vital Support and an Ordinance Which Does so is Void.

Murdock *v.* Pennsylvania, supra.

"An Ordinance Which Empowers a Board or Officer to Decide Whether Activities of a Religious Group are or are not Religious or Which Requires That All Contributions Secured by Solicitors Shall be Devoted to Purely Religious Purpose Contravenes the Federal Constitution.

Murdock *v.* Pennsylvania, supra.

"The Constitutionality of an Ordinance Purporting to Exercise the Police Power may be Tested by its Operation and Effect as Construed and Applied by Officers Authorized to Enforce it.

Murdock *v.* Pennsylvania, supra;
Cantwell *v.* Connecticut, supra;
Near *v.* Minn. ex rel. Olsen, 283 U. S. 697;
In re Darte, supra."

(Points and Authorities, Petition for Hearing, Pages 3-5.)

Defendant and Respondent's Answer to Petition for Hearing

The respondent court represented by the Los Angeles City Attorney filed an Answer opposing the granting of the petition for Hearing by the State Supreme Court. The Answer states that "The legislative provisions comprise Sections 44.01 to 44.19, inclusive, of the Los Angeles Municipal Code (Ordinance No. 77,000 as amended); that Sections 44.05, 44.12 and 44.16 are "primarily involved," and that "Full explanation of such sections may require reference to other sections, and the Answer states:

"Section 44.05 provides that all persons desiring to solicit for charitable purposes shall file, as a condition precedent to engaging in such activity, a statement setting forth certain information. Having filed the required statement one may proceed with such solicitation without further ado, provided only that he comply with the provisions of Section 44.12, which section requires that he carry and exhibit an information card provided for by Section 44.03, for which card a charge is made. The important point is that there is no provision in the ordinance authorizing the Board of Social Service Commissioners to refuse to issue such cards or to prevent such solicitation.

"Section 44.10 provides that one who solicits for or on behalf of a charitable organization, using its name, must have written permission so to do.

"Section 44.06 provides that a charitable organization which elects to conduct solicitation by agents, etc., must file copies of its contracts with such agents.

"Section 44.19 governs the matter of solicitation by 'promoters.' It does not appea by the petition that the corporation petitioner has utilized the services of a promoter, nor does it appear that Murdock is acting as a promoter. Therefore, consideration of the provisions of Section 44.19 is immaterial to this case.

"Especial attention is directed to that portion of Section 44.16 which provides that no portion of the article in which the various sections above named appear, except Section 44.01 (definitions) and Section 44.04 (fraudulent solicitations), applies to 'solicitations made solely for evangelical, missionary, or religious purposes.'"

It is said that the Ordinance does not involve the Federal Constitution and in that behalf the answer argues:

"As pointed out, the only requirement is that soliciting agencies file a statement, secure information cards and exhibit such cards to the members of the public upon whose benevolence they depend for contributions.

"It is a well known fact that John Public is the sucker who foots the bills and is victimized by various unworthy schemes promoted in the name of charity. We see no undue hardship upon any organization, religious or otherwise, in a requirement which, as a condition precedent to solicitation of funds from the public, requires the filing of a statement setting forth the purposes for which gifts are to be used. Certainly the person who is asked in the name of charity to part with that which he has earned by the sweat of his brow is entitled to be advised concerning the nature of the organization which expects to distribute the largess he is asked to bestow." (Ibid. Pages 6, 7.)

It is asserted in all reported cases that:

> "We find no reported cases which support such theory of law. To the contrary, we find that all such cases recognize the right to exercise reasonable control over the activities of religious orders so long as no effort is made to either control their beliefs or restrict their public advocacy of their beliefs." (Ibid. Page 7.)

Excerpts from *Cantwell* v. *Connecticut*, 310 U. S. 296, 84 L. Ed. 1213, are quoted, the gist of which are: "The Amendment (14th) embraces two concepts—freedom to believe and freedom to act. The first is absolute, but in the nature of things, the second cannot be. • • •"

> "It is equally clear that a state may by general and non-discriminatory legislation regulate the times, the places, and the manner of soliciting upon its streets and of holding meetings thereon; and may in other respects safeguard the peace, good order and comfort of the community, without unconstitutionally invading the liberties protected by the Fourteenth Amendment." (Ibid. Page 8-D.)

> "Without doubt a State may protect its citizens from fraudulent solicitation by requiring a stranger in the community, before permitting him publicly to solicit funds for any purpose, to establish his identity and his authority to act for the cause which he purports to represent. The State is likewise free to regulate the time and manner of solicitations generally, in the interest of public safety, peace, comfort or convenience." (Ibid. Page 8.)

Murdock v. *Pennsylvania*, 87 L. Ed. 1292 (Adv. Op.), is quoted as follows:

> "As we have said, it (the ordinance involved) was not merely a registration ordinance calling for identification of the solicitors so as to give the authorities some basis for investigating strangers coming into the community." (Ibid. Page 9-F.)

In respect to *In re Darte* (172 Cal. 47) decision, the answer states:

> "The latter part of the majority opinion in the Dart case contains a wonderful panegyric upon the benefits of charity but is as devoid of law as is Pilgrim's Progress.
>
> "Our ordinance does not give anyone the right to prohibit solicitation for charity as did the ordinance involved in the Cantwell case. It provides solely a means of registration of persons intending to solicit for donations, and a requirement that solicitors identify themselves and, by means of an information card, inform prospective donors of certain facts reasonably calculated to enable such donors to determine whether they wish to give to such particular charity." (Ibid., Page 10-G.) Concerning Section 44.16, respondents say:
>
> "'The provisions of Section 44.16, if in fact constituting a religious test, establish such test as the measure of being relieved from doing reasonable acts required of all persons other than those who wish to take advantage of the exception. . . .'
>
> "The provision found in Section 44.16 is for petitioners' benefit for the reason that it gives to them, and others similarly situated, privileges not enjoyed by all, because they are placed within a separate class. It appears to us to be well settled that one may not complain of a provision in an ordinance which operates to his benefit. (Ibid. Pages 10, 11-H.)

Brief by Amici Curiae

A brief "Amici Curiae" was also filed, with permission of said Supreme Court, in support of said Respondent Court's decision. The attorneys filing this brief purport to represent numerous "charitable organizations" of Los Angeles County which are said to be members of "Community Welfare Federation," also known as "Community Chest." (Am. Cur. Br. Pages 1, 2).

After declaring the position of said organization as favorable to religious freedom and as upholding said ordinance as constitutional, the Amici Curiae quote said City Attorney's brief, Points II to IV, inclusive, filed in the case of *Gospel Army* v. *City of Los Angeles, et al.*, consisting of 13 pages, the last 4 pages of which concerns junk dealers, and is not involved herein. (Am. Cur. Brief, Pages 3-16).

Said brief states that the writers have not had time to give research which they desired to the matter, but are astounded that anyone would "contest the Ordinance," and predict that if held invalid "it would throw open the City of Los Angeles to an influx of organizations grossly defrauding our charitably minded citizens," and it is asserted that, "if any activity of any person is truly religious in character, it is specifically exempted by the Ordinance. (Sec. 44.16). (Am. Cur. Brief, Page 18).

Petitioner's Reply to Amici Curiae Brief and Respondent's Answer Opposing Petition for Hearing

Thereafter Petitioners filed a brief entitled "Reply to Respondent's Answer and to Amici Curiae Brief."

In this reply, attention is called to the fact that Amici Curiae's brief implies that the Gospel Army and the Rescue Army dupe and defraud the public and that if this is true "provisions of the State Penal Code afford ample remedies," and would afford ample protection against any predicted influx of fraudulent organizations to follow in the event said ordinance be held invalid; it is pointed out that said Amici Curiae adds nothing to the discussion of the issues involved and serves no purpose except to add the weight of well known, influential organizations, in support of respondent's cause; that the Gospel Army and Rescue Army causes had been consolidated for purposes of argu-

ment in said Supreme Court, and the mere quotation from the City's brief in the first named case could be no aid to the Court: that the representation that the writers represent "many more charitable organizations" in addition to those enumerated, is hearsay, and that those enumerated are of "such standing to have received the approval of the Municipal Charities Commission" and to have been "placed on the favored list of those exempt from the principal oppressive and unconstitutional provisions of the Ordinance," as shown by the public record of the City of Los Angeles; that the condition thus presented is reminiscent of that shown to have prevailed when the opinion in *In re Darte*, 172 Cal. 72 was written when numerous "recognized Churches" and other "endorsed" organizations were exempted from provisions similar to those in the instant ordinance under a section which, the opinion states, "permits such charitable work to be carried on only by 'trustee satisfactory to the Municipal Charities Commission'"; that said provision and the entire ordinance was held discriminatory and void. (Petitioners Reply to Respondent's Answer and Amici Curiae Brief, Pages 1-3).

Petitioners' last named brief points out the Ordinance Sections from compliance with which the "endorsed" list are relieved by the Board's endorsement under Section 44.01, among which the following are listed:

> "1. Having been "approved" and "endorsed" they are thus exempted from the necessity of waiting during an indefinite and unlimited time for the board "to investigate the allegations of notice of intention, or any statement or reports." (Ord. Sec. 44.02, (a), which they might be required to file." (Ord. Sec. 44.02, (a).
>
> "2. They are relieved from the prior restraint incidental to exposing all of their "books, records and papers" to the board or its employees and waiting for

whatever period said authorities see fit to consume in "inspection" and "making copies" thereof. (Ord. Sec. 44.03, (b).

"3. They are exempted from the handicap of interruptions through further investigations of any and all types and manners which the ordinance gives the City authorities which they may choose to make, without limitation or restraint, after solicitations have begun, (Ord. 44.02(3), and, hence, are given carte blanche to use any methods amici curiae see fit to employ, subject only to the risk of criminal prosecution by the state.

"4. They are entirely relieved of the necessity of securing for their solicitors or promoters information cards (Ord. Sec. 44.02, (d), (licenses; so designated in Secs. 44.05, 44.06, 44.08, 44.10, 44.11, 44.12, also since every promoter is a solicitor under Sec. 44.01, Sec. 44.19), and the delays entailed in that laborious time-consuming, oppressive procedure. (Ord. Sec. 44.02, (d, 1). (Ibid. Page 6.)

Petitioners replied at length to that portion of the Gospel Army brief which is quoted by *Amici Curiae* and in that behalf shows that the City Attorney of said City claims "the right (under Section 44.16) of the Board to classify any case as for charity alone if all contributions are not used 'solely for religious purposes'" and argues that this claim concedes that the Board applies a religious test in determining whether the cause is "solely for religious purposes." (Ibid. pages 5-10.)

Murdock v. Pennsylvania, 319 U. S. 105, 87 L. Ed. 1292, and *Cantwell v. Connecticut*, 310 U. S. 296, 84 L. Ed. 1213 are relied upon as condemning the claim of the Board that solicitation is not solely for religion if any part of collections made are used to pay a solicitor or colporteur, and the Cantwell opinion is quoted in its holding that the fact that an administrative officer may be compelled to issue a certificate to entitle one who would solicit for a religious

cause to do so, does not suffice as a remedy where a law empowers such officer to decide whether the purpose is religious and to refuse the certificate if he decides negatively; also that the right to solicit for religion or charity incident to such causes may not be restrained to prevent fraud, because, it is said, "certainly, penal laws are available to punish such conduct."

It is contended that the instant ordinance is more clearly violative of due process and religious freedom than the one involved in the *Cantwell* case because in the latter the ordinance permitted exemption if the purpose was "a religious one or a bona fide object of charity", whereas the instant law requires that the cause be "purely" religious with no adulteration, however slightly, by charity (Ibid. Pages 15, 16).

In re Darte, 172 Cal., is quoted as refuting the City's claim in its Gospel Army brief (quoted by *Amici Curiae*) that the "purely religious" provision is constitutional because the Darte opinion held that a law which sets up an absolute standard of perfection is "arbitrary, unreasonable, and oppressive" and void; that a religious cause cannot be made something else by legislation, and that an Ordinance which was in force in Los Angeles in 1916 which differentiated religion and charity as applied to "religio-charitable" organizations violated due process, and the free exercise of the rights of religion and to be charitable, although the money solicited by the Salvation Army was to be used to maintain hospitals, lodging houses, charities, and a second-hand store, as well as for purely religious purposes (Ibid. Pages 11, 12).

The Opinions of the State Supreme Court. 28 A. C. 475

The majority and dissenting opinions are set forth in the appendix to this statement. The majority decision and

opinion of the Supreme Court sustains the constitutionality of the Sections and provisions of the Ordinance involved, either expressly or by necessary implication, against all attacks by the petitioners, the Rescue Army and Charles T. Murdock. It expressly declines to decide whether the ordinance is being unconstitutionally applied to Petitioners because, the opinion states, "The allegations relied upon in support of this contention, however, are denied by the Answer" (28 A. C. 488).

Said decision sets forth in Footnotes the Ordinance Sections, 44.09 and 44.12, which Petitioner Murdock was charged to have violated and also certain other interrelated sections, to-wit: 44.03 and 44.05; without naming certain grounds upon which petitioners had challenged the constitutionality of said sections (except 44.09) said opinion determined such challenges adversely to petitioners' contentions by referring to the Supreme Court's decision in "the Gospel Army case, ante, page —" (28 A. C. Pages 485, 488).

Reference to the opinion in *Gospel Army* v. *City of Los Angeles*, 27 A. C. 246, shows that the opinion therein considered, construed, and passed upon Sections 44.01 to 44.18, inclusive, together, and held that none of them were subject to attack upon the constitutional grounds assigned by the Gospel Army, although special consideration was given to certain sections. These comprise all of the ordinance except Section 44.19 relative to "Promoters" and 24.01 regulating Pawn Brokers and Junk Dealers. The opinion in that case does not mention by number all of the sections in the group 44.01 to 44.18; and among those not so mentioned is 44.09 (27 A. C. 248-253). Thus, by adopting the first portion of the Gospel Army opinion, the instant opinion upholds as constitutional all of said group of sections.

It is stated that the Ordinance is regulatory to prevent fraud and deception in the solicitation of funds and that "it is clear that the intent is to regulate charitable solicitations whether or not they are part of a religious purpose" (28 A. C. 487).

In justifying such regulations *Cantwell* v. *Connecticut*, 310 U. S. 296, is quoted, and *Reynolds* v. *United States*, 98 U. S. (28 A. C. 485).

In upholding Section 44.09, said opinion holds that "sufficient standards for the issuance of the permit are inherent" in the section although not contained in its language, which inherent standards are that it appear to the Board from the information secured that the solicitation as planned would not interfere "with the public convenience and safety" and there must be an absence of disclosure of fraud, and it is adjudged and determined that said section is reasonable and "assures regulations without discrimination as to persons or causes". The opinion states that in the matter of restraint imposed said section is not like the statute condemned in *Cantwell* v. *Connecticut*, 310 U. S. 296, (28 A. C. 487).

With respect to subdivision "(b)" of Section 44.09, said opinion holds that the provision requiring the giving of the "Notice of Intention", provided in Section 44.05 and compliance with other provisions of the "Article", to-wit: the Ordinance involved, is constitutional and valid for the reasons stated in "the Gospel Army case" (28 A. C. 488).

The dissenting opinion by Justice Carter begins by upholding petitioners contention that "the Ordinance involved is clearly unconstitutional;" the opinion refers to the writers dissenting opinion in *Gospel Army* v. *City of Los Angeles*, 27 A. C. 246, 264, for a statement of the reasons. (28 A. C. 490.)

The opinion quotes Section 44.09(a) as follows:

> "No person shall solicit *any* contribution for *any purpose* by means of any box or receptacle, upon any public street, sidewalk or way, or in any public park or in any publicly owned or controlled place, except by express written permission of the Board." (Emphasis added.)

Justice Carter states that this language includes publicly owned or controlled property, and that, omitting the exception concerning permission, it is an absolute prohibition against solicitation in such places and that under *Murdock* v. *Pennsylvania,* 319 U. S. 105 and other cases this is a violation of petitioner Murdock's right to freedom of religion, and, hence the entire subsection is void (28 A. C. 491.)

The opinion holds that since the giving of official permission "is uncontrolled" that provision cannot save the whole subsection from unconstitutionality, citing *Cantwell* v. *Connecticut, supra,* and other decisions, with quotations from cases and digests. (28 A. C. 491).

The opinion declares that "the majority opinion by judicial legislation places those standards in the Ordinance," and that this attempt to unearth vague and uncertain standards cannot stand in the face of this Court's decision. *In re Porterfield,* 28 A. C. 102." (28 A. C. 493).

In the *Gospel Army* case, Justice Carter Dissenting Opinion, the jurist protests the lack of analysis of the Sections and provisions of the Ordinance and the mere generalizations with which he says the majority opinion is "replete"; he asserts a doubt that "even the author opinion would say that none are unduly onerous" as that opinion does, "were each regulation discussed in detail and given separate consideration." (27 A. C. Page 274). Justice Carter does this and concludes that the Ordinance and all of its principle provisions, are violative of the 14th Amend-

ment as infringements upon the right of religious freedom, due process or the equal protection of the laws. (27 A. C. 274-284).

The portion of Justice Carter's opinion in the Gospel Army case to which he refers in his dissent herein, calls attention to the "formula" provided by this Court in *Schneider* v. *Irvington*, 308 U. S. 147, for determining cases on appeal wherein the rights of freedom of the press or of religion conflict with other rights and asserts that the procedure followed in the majority opinion conflicts with said "formula rule," (27 A. C. 266), and Justice Carter points out that the provision of Section 44.16 of the Ordinance which exempts from its provisions only those religious activities which are "solely" for religious, missionary or evangelical purposes establishes an unwarranted religious test and empowers administrative officers to decide what purposes are "solely" of these types and he condemns as a violation of the right of religious freedom the rule that no license will be sold to a solicitor of the promoter class, unless the Board determines that fifty per cent of the collections shall go to the charitable purpose involved and in that behalf he relies upon the *Cantwell* v. *Connecticut* decision and *In re Rarte*, 172 Cal. 47. (27 A. C. 268-272).

This opinion of Justice Carter, as well as Justice Edmond's dissenting opinion in the Gospel Army case, to which the Carter dissent herein refers, rely upon the two cases last named to demonstrate that charity is an integral part of religion as preached and practiced by all true followers of Jesus or of the Jewish faith and that the instant Ordinance as a whole violates the right of freedom of religion in that, as he states, the majority opinion itself shows, said Ordinance purports to and does segregate and sever charity from religion, and by Section 44.16 removes from the religious field and arbitrarily places in the charity seg-

ment substantially all religious charities. (27 A. C. Pages 271-273 and Pages 289-291).

Justice Schauer concurred in the following statement:

> "I concur in the conclusion reached by Mr. Justice Carter and in the discussion supporting his conclusion insofar as it relates to the constitutionality of the ordinance involved herein."

Justice Edmonds' dissenting opinion reads:

> "For the reasons stated by me in the Gospel Army case, I am of the opinion that section 44.09 of the Los Angeles ordinance, as well as the provisions which were considered in the prior proceeding, are unconstitutional. Accordingly, I join in the conclusion that the writ of prohibition should issue."

The Petition for Rehearing

Thereafter and within the time allowed by law and the rules of the State Supreme Court, plaintiff petitioned said Court for rehearing of said appeal. This petition cannot well be condensed and its salient points are best shown by setting forth the principal paragraphs thereof, which read as follows:

"Reasons for the petition are:

The majority opinion and the decision of this Court indulges in judicial legislation without which the conclusion reached would have no foundation.

Said opinion is in apparent irreconcilable conflict with other leading decisions of this Court from which situation great confusion as to the law therein written results.

The instant decision and opinion errs in failing to recognize that sections of the ordinance involved are so dependent upon and interwoven with other sections thereof

and the whole scheme and plan of said law that they cannot be segregated and judicially appraised alone.

Said opinion and decision fails to consider questions presented by the petitioners without which a full and complete decision cannot be rendered."

Petitioners Specify the Following Grounds for Rehearing:

> "The opinion and decision herein adds to Section 44.12 of the ordinance involved, a provision of law which reads: 'The denial of a permit is warranted only if the information furnished the Board discloses fraud or if the solicitation as planned would interfere with the public convenience and safety.'
>
> "By adoption from the opinion in Gospel Army v. City of Los Angeles (recently delivered) the instant opinion enacts that 'the department is without authority to withhold such cards (inspection cards) when the requirements are met.' to-wit, 'the filing of the required information and payment of four cents for each.'"

The instant opinion errs in that it gives scant attention to sections of the ordinance other than 44.09 and 44.12, and none to the general plan and design of the law, although said sections, standing alone, and as applied to all solicitations, including those for religion, would be clearly violative of the 14th Amendment to the Federal Constitution as creating prior restraints upon the exercise of the right of religious freedom and as delegating to an administrative board powers to act unreasonably, arbitrarily and with partiality.

> (a) Section 44.09, as pointed out in the dissenting opinion by Mr. Justice Carter, contains three inhibitions.
>
> That contained in 44.09 (a) is clearly applicable to the instant case since the solicitations by Murdock for the Rescue Army concerns religious activities,

and the provisions for charities are expressly set forth in subdivision (b).

Section 44.09 (a) prohibits all solicitations through receptacles on public streets, etc., except with "express written permission of the Board." Hence the Board is unrestricted as to the exercise of its discretion. The said 14th Amendment, itself, permits such solicitations for religion, but the section permits the Board to refuse them at its own unbridled discretion or groundless whimsy.

(b) Section 44.12 applies to all solicitation for charitable purposes. The ordinance purports to regulate them. However, its classification and definition of charities includes religious purposes if any fraction of the money or goods is to be used for charity. (Section 44.16.)

Also, to "exhibit an information card" as Section 44.12 requires, involves the prior securing of such card (Section 44.02). This much the opinion herein notices, but it fails to consider numerous other sections necessarily involved in securing such card.

True, said opinion refers to the Gospel Army opinion in this behalf, but that opinion failed entirely to analyze or elucidate such other sections although the dissenting opinions in that case perform that function and unanswerably show that separately, and as a whole, prior restraints upon the exercise of the right of freedom of religion and of charity of a prohibitive, arbitrary and highly prejudicial character are created.

(a) The opinion herein is defective and errs in that it fails to consider the assignment in the petition that the provision of said ordinance which authorizes the Department of Social Service to "approve" such charitable associations" as it deems are entitled to approval and thereby exempt them and their solicitors from all of the procedural requirements of the ordinance, including those in Sections 44.12 and 44.09, empowers said Department to grant immunities and privileges to a class while

denying the same to others in violation of said 14th Amendment and of Article I, Section 21 of our State Constitution.

This issue is directly involved in the instant appeal.

(b) Said opinion and decision, in holding Sections 44.09 and 44.12 constitutional, fails to consider that in order to obtain the "Information Card" required therein the applicant must file a notice of intention, of a voluminous character, supply any and all "additional information" which the Department sees fit to demand; wait while said Department conducts an investigation of unlimited scope, if it chooses to do so; have the written authorization of the person or organization he represents, and he or it must maintain an accounting system.[1]

These are among the burdens to be borne prior to securing an information card to be exhibited in soliciting pursuant to Section 44.12. Legally or illegally, they are all prior restraints upon solicitation, and to pass upon the legality of Section 44.12 without considering them is to exclude the gist of the last section. Other sections add even greater burdens, after solicitations are made. Section 44.05 to 44.16, inclusive, are one unit and Section 44.12, alone, is insignificant as a revelation of its true import and the prior restraints which it entails.

(c) The petition for issuance of a writ of prohibition and the petition for hearing in this Court squarely present the issue that petitioners' activities for which Murdock is prosecuted are religious, and that to require, as the ordinance does, that they be licensed through the issuance of an "Information Card" is a clear infringement of the right to exercise religious freedom and of the 14th Amend-

[1] Section 44.05, of which Justice Carter in the *Gospel Army* case said: "The much maligned income tax forms . . . are no more complex and demanding."

ment to the Federal Constitution, and since no such license can be lawfully made a prerequisite to solicitation for religious purposes Sections 44.12 and 44.09 are necessarily unconstitutional exactions.

The instant opinion applies these provisions of an ordinance purporting to regulate charities to religious activities. Yet no mention of the religious feature is made or justification provided by reference to the arbitrary provision of the ordinance which classifies all solicitations not "purely" religious as charitable.

Petitioners have argued to this Court that the entire ordinance, including Sections 44.09 and 44.12 are violative of the right of religious freedom by reason of said unreasonable and unwarranted classification, and, it is submitted, the validity of the last-named sections cannot be determined without consideration of the validity of the "purely for religious" provision.

Petitioners have claimed that Sections 44.09 and 44.12 are rendered invalid under the equal protection of the laws clause of the 14th Amendment to the Federal Constitution by the provisions of Section 44.03, which empowers the City Board to exempt others similarly situated from compliance with Sections 44.09 and 44.12. The opinion and decision herein fails to consider this issue.

For the foregoing reasons and upon the grounds above set forth petitioners adhere to their contentions heretofore made in respect to the ordinance as a whole and Sections 44.09 and 44.12 in particular are violative of the privileges and immunities clause, the equal protection of the laws clause, and the due process guaranty of the 14th Amendment to the Constitution of the United States, and ask that a rehearing of this appeal be ordered.

ROBERT H. WALLIS,
Counsel for Appellants.

APPENDIX JURISDICTIONAL STATEMENT

Opinions of Court

GIBSON, *C. J.*

Petitioners seek a writ of prohibition to restrain the Municipal Court of the City of Los Angeles from proceeding to try petitioner Murdock for the alleged violation of certain sections of an ordinance, regulating the solicitation of contributions, which it is claimed are in conflict with the federal Constitution, Amendments I and XIV, and the California Constitution, Article I, section 21. It is alleged that Murdock has been twice convicted of a violation of the ordinance, that each time the conviction was reversed by the appellate department of the superior court, that a third trial has been ordered, and that the respondent court will proceed therewith unless restrained.

(1a) The constitutionality of a statute or ordinance may be tested by prohibition on the ground that invalidity of the legislation goes to the jurisdiction of the court to proceed to try the case. (See Whitney *v.* Superior Court, 182 Cal. 114 (187 P. 12); Levy *v.* Superior Court, 105 Cal. 600 (38 P. 965, 29 L.R.A. 811); Arfsten *v.* Superior Court, 20 Cal. App. 269, 275 (128 P. 949); cf. Broady *v.* Jennings, 70 Cal. App. 647 (234 P. 120).) This rule is supported by the great weight of authority in other states. (See cases collected in 113 A.L.R. 796, 800; 42 Am. Jur. 168.) The same principle has been applied in cases where habeas corpus has been used to test the constitutionality of an ordinance. (See In re McCoy, 10 Cal. App. 116, 124-125 (101 P. 419); In re Vitalie, 117 Cal. App. 553, 557 (4 P. 2d 171); cf. Ex parte Kearny, 55 Cal. 212; Ferris, Extraordinary Remedies (1926) 83; 1 Bailey on Habeas Corpus (1913) 91-93; 25 Am. Jur. 164.) Although the right to discharge by habeas corpus is not limited to cases in which a court has exceeded its jurisdiction (see Pen. Code, 1485, 1487; In re Bell, 19 Cal. 2d 488, 492-495 (122 P. 2d 22); Portnoy *v.* Superior Court, 20 Cal. 2d 375, 378 (125 P. 2d 487)), the writ has been traditionally used for that purpose. (See In re Vitalie, 117 Cal. App. 553, 557 (4 P. 2d 171).)

The view that constitutionality goes to jurisdiction has at times disturbed the courts because of the possibility that full application of the theory might render otherwise final judgments vulnerable to collateral attack, and confusion also has sometimes arisen because of a failure to understand that a court has jurisdiction to determine its own jurisdiction in the first instance. The difficulties inherent in applying the term jurisdiction in cases involving unconstitutional statutes impelled the court in the Bell case to recognize that habeas corpus may be used in certain situations to test the constitutionality of a statute whether or not there is a want of jurisdiction. (19 Cal. 2d at pp. 492, et seq.) In Prohibition, however, we are limited by statute to proceedings without or in excess of jurisdiction (Code Civ. Proc., 1102) and we are therefore squarely confronted with the problems referred to above.

(2a) The fact that a trial court has no jurisdiction within the meaning of the term as used in certiorari and prohibition proceedings does not mean that a judgment based upon an unconstitutional statute is open to collateral attack. In Chicot County D. Dist. *v.* Baxter State Bank, 308 U. S. 371 (60 S. Ct. 317, 84 L. Ed. 329), a civil case, the court declared that broad statements to the effect that unconstitutional laws confer no rights whatsoever must be taken with qualifications and that a decree based upon an assumption of validity is res judicata. (See, also, 136 A. L. R. 1032; (1942) 28 Va. L. Rev. 656-657; (1942) 27 Iowa L. Rev. 315-322 and (1942) 26 Minn. L. Rev. 658-661.) (3) In certiorari and prohibition proceedings the term jurisdiction has a very broad meaning, and a writ may be granted where the court has no jurisdiction to act except in a particular manner, even though it has jurisdiction, in the fundamental sense, over the subject matter and the parties. (Abelleira *v.* District Court of Appeal, 17 Cal. (2d) 280, 287 *et seq.* (109 P. (2d) 942, 132 A. L. R. 715); Hill *v.* Superior Court, 16 Cal. (2d) 527 (106 P. (2d) 876); Fortenbury *v.* Superior Court, 16 Cal. (2d) 405 (106 P. 2d 411).) (2b) It does not follow, therefore, that to allow prohibition in such cases will result in opening the door to collateral attack.

(1b) The Bell case correctly declares that the trial court has jurisdiction to determine whether the statute is constitutional, and the same is true as to any other jurisdictional defense. The mere assertion of a claim of unconstitutionality does not oust the trial court of jurisdiction, because the very issue of constitutionality is one which the court has jurisdiction to determine. (See discussion, In re Bell, supra, 19 Cal. 2d 488, 492.) This proposition, however, is not inconsistent with the holding that prohibition lies to restrain a court from proceeding without or in excess of jurisdiction. (See Abelleira *v.* District Court of Appeal, 17 Cal. 2d 280 (109 P. 2d 942, 132 A. L. R. 715); Hill *v.* Superior Court, 16 Cal. 2d 527 (106 P. 2d 876).) A court has jurisdiction to determine its own jurisdiction, for a basic issue in any case before a tribunal is its power to act, and it must have authority to decide that question in the first instance. (4) It is necessary, therefore, to challenge the jurisdiction of the trial court in that court, by demurrer, motion, plea or other objection of some kind, so that that court may preliminarily decide the question whether it has jurisdiction to proceed. And unless a party can show that a lower tribunal, after first determining that it has jurisdiction, is proceeding to exercise it, there is nothing for a higher court to prohibit. This obvious principle is one of the cornerstones of our system of lower and higher tribunals.

(5) The statement in Portnoy *v.* Superior Court, 20 Cal. 2d 375, 387 (125 P. 2d 487), that a trial court is not deprived of jurisdiction to determine the constitutionality of a particular ordinance or statute by virtue of the fact that it may decide the question erroneously, is properly applicable to this basic right of the trial court to decide the question of jurisdiction in the first instance.

(1c) When, however, the trial court has heard and determined the jurisdictional challenge, and has decided in favor of its own jurisdiction, and then proceeds to act, that is, to try the cause on its merits, the situation is entirely different. It then may be properly claimed that a court without jurisdiction is purporting to exercise it.

At this stage, jurisdiction to determine jurisdiction has been exercised, and the higher courts will, in an appropriate case, restrain the lower court from acting in excess of jurisdiction (see, e.g., Greenberg *v.* Superior Court, 19 Cal. 2d 319 (121 P. 2d 713); Abelleira *v.* District Court of Appeal, 17 Cal. 2d 280 (109 P. 2d 942, 132 A. L. R. 715); Jackson *v.* Superior Court, 10 Cal. 2d 350 (74 P. 2d 243, 113 A. L. R. 1422).) (6) The petition should affirmatively allege that the challenge to jurisdiction was raised in the lower court.

Although the petition in the present case does not affirmatively allege that the jurisdiction of the municipal court was challenged by an appropriate motion, the parties do not assert such a challenge was not made, and since Murdock has been twice tried for the violation of an ordinance which from the outset he has claimed to be unconstitutional, and the case has been set for trial a third time, it is apparent that the court has decided in favor of its own jurisdiction and is proceeding to exercise it. Moreover, although the requirement that before applying for prohibition the claim of unconstitutionality must be made in the trial court has been generally observed in practice (see Jackson *v.* Superior Court, supra, the Greenberg *v.* Superior Court, supra) the requirement that the petition must affirmatively allege compliance with the condition has not been emphasized in previous decisions of this court. Under these circumstances we have determined that it is not in the interests of justice to refuse to entertain the application because of the absence of a more complete showing in the petition.

(7) It is not, of course, a proper case for prohibition if there is a plain, speedy and adequate remedy in the ordinary course of law. As we have seen, the constitutional challenge may ordinarily be made by demurrer or motion in the trial court. In addition, habeas corpus may be used to test the constitutionality of a statute (In re Bell, 19 Cal. 2d 488 (122 P. 2d 22)), and the availability of that remedy has been held to be a complete bar to the issuance of prohibition. (Leach *v.* Superior Court (1932), 215 Cal. 531 (12 P. 2d 1).) But where, as here, the defendant cannot use habeas corpus because he is not being deprived of his

liberty, he should not be refused prohibition, while awaiting trial, solely on the ground that habeas corpus would be available if he would submit to imprisonment.

(8) The next question, therefore, is whether trial and appeal are adequate remedies under the circumstances of this case. A remedy is not inadequate merely because more time would be consumed by pursuing it through the ordinary course of law than would be required in the use of the extraordinary writ of prohibition. (Bennett *v.* Superior Court, 218 Cal. 153, 156 (21 P. 2d 946); Lindley *v.* Superior Court, 141 Cal. 220 (74 P. 765); Agassiz *v.* Superior Court, 90 Cal. 101 (27 P. 49).) Experience has shown that most of the meritorious defenses are sustained and most of the unsubstantial constitutional or other objections are weeded out at the proper time on the proper showing during the trial or on appeal. These remedies are therefore considered adequate in the usual situations. If this were not so, then whenever jurisdiction is challenged prohibition would lie and the trial of the case would be interrupted until the reviewing court passed upon the intermediate question and appellate courts in many cases would be converted into nisi prius courts. (Agassiz *v.* Superior Court, 90 Cal. 101, 103 (27 P. 49).)

It does not follow, however, that the remedies of trial and appeal must be considered adequate in all situations. It has been held in two recent cases that these remedies did not afford sufficient relief under the circumstances there presented. (Greenberg *v.* Superior Court, 19 Cal. 2d 319 (121 P. 2d 713); Jackson *v.* Superior Court, 10 Cal. 2d 350 (74 P. 2d 243, 113 A. L. R. 1422).) In the Jackson case an attempt was made to retry the defendants on the identical charge for which they previously had been in jeopardy. In the Greenberg case there was an indictment of an individual against whom no evidence at all was presented to the grand jury. The issue of jurisdiction was first raised in both cases by motion or demurrer in the trial court and petitioners sought prohibition only after an adverse ruling below. The disregard of the fundamental rights of the defendants in these cases was so obvious and flagrant that this court felt that the expense, effort and delay of trial in the superior court would be an unfair burden on the petitioners.

(9) The fact that the remedies of trial and appeal were considered adequate in some cases and not in others does not mean that the application for the writ was arbitrarily granted in one and refused in another or that the decisions cannot be reconciled on principle. It is difficult, if not impossible, to lay down a hard and fast rule which will govern all situations, and it must be determined in each case, not only on the basis of precedent but from an examination of all the facts, whether there is an adequate remedy in the ordinary course of law. A reviewing court, in order to prevent a failure of justice, has discretion in accordance with established legal principles and practice, to determine the circumstances which justify the use of prohibition to restrain a lower tribunal from acting without or in excess of its jurisdiction. And in the exercise of that discretion it may take into consideration the desirability of the prompt settlement of an important jurisdictional question so that a multiplicity of void proceedings in other cases will be prevented.

(10) As heretofore pointed out, petitioner Murdock has been subjected to two trials and has successfully prosecuted two appeals from judgments of conviction. We granted a hearing in this matter after petitioners' application for a writ to restrain a third trial was denied by the district court of appeal, and, in order to secure uniformity of decision of related problems, transferred to this court the appeal in Gospel Army *v.* City of Los Angeles,[2] 27 Cal. 2d 232 (163 P. 2d 704), in which plaintiff sought to enjoin the enforcement of the same ordinance. We should not under these circumstances, in fairness to petitioner or respondent court, refuse to decide in this proceeding the jurisdictional question involved in the criminal charges, on the ground that there is a plain, speedy and adequate remedy by trial and appeal.

We come, therefore, to the question whether the sections of the Los Angeles Charities and Relief Ordinance under which Murdock is charged are unconstitutional. In the Gospel Army case, supra,[3] page 232, we examined this legislation and some of the basic problems here involved are

[2] Advance Report Citation: 27 A. C. 246.
[3] Advance Report Citation: 27 A. C. 246.

answered by our decision in that case, but we did not have occasion to deal specifically with one of the sections of the ordinance under which Murdock is charged. A certain amount of repetition of our discussion in the Gospel Army case is unavoidable if we are to present in an orderly and understandable manner the issues raised by petitioners' contentions in this proceeding.

Insofar as pertinent here, the ordinance provides that no person shall solicit any contribution for any charitable purpose unless there shall be filed with the Department of Social Service written notice of intention to solicit, together with information concerning the character of the solicitation, how it is to be made, and the purpose for which the funds are to be used. (44.05.)[4]

The department is authorized to investigate the statements made by the applicant and to issue information cards setting forth such facts as may be necessary to

[4] Sec. 44.05. CHARITY SOLICITATION—NOTICE OF INTENTION:

No person shall solicit, nor shall any officer or member of any association authorize any person to solicit, any contribution for any charitable purpose, unless, within the fiscal year of the City in which such solicitation is made and at least ten (10) days prior to the beginning of such solicitation, there shall have been filed with the Department, on a form furnished by said Department, by such person or association upon whose behalf the solicitation is made, written Notice of Intention to solicit such contribution, which notice shall contain complete information as follows:

(a) The purpose of the solicitation and use of the contribution to be solicited;

(b) A specific statement, supported by reasons and, if available, figures, showing the need for the contribution proposed to be solicited;

(c) The character of such solicitation and how it will be made or conducted;

(d) The expenses of the solicitation, including salaries and other items, if any, regardless of from what funds such expenses are payable;

(e) What portion of the contributions collected as a result of the solicitation will remain available for application to the specific purposes declared in the Notice of Intention as the object of the solicitation;

(f) A specific statement of all contributions collected or received by such person or association within the calendar year immediately preceding the filing of such Notice of Intention; the expenditures or use made of such contributions, together with the names and addresses of all persons or associations receiving salaries, wages, compensation, commissions or emoluments from such contributions, and the respective amounts thereof;

acquaint the public with the nature and worthiness of the purpose for which the solicitation is made. (44.03.)[5]

The solicitor is required to exhibit the information card and read it to the person solicited, or present it for his perusal before accepting a contribution. (44.12.)[6]

(g) The names and addresses of the officers and directors of any such association for which the solicitation is proposed to be made;

(h) A copy of the resolution, if any, of any such association authorizing such solicitation, certified to as a true and correct copy of the original of such resolution by the officer of such association having charge of the records thereof;

(i) A statement that the signers of such Notice have read and are familiar with the provisions of this article and will require all solicitors engaged in such solicitation to read and be familiar with all sections of this Article prior to making any such solicitation.

[5] Sec. 44.03. Powers of Department:

The Department shall have the following powers:

(a) To investigate the allegations of Notice of Intention, or any statement or reports:

(b) To have access to and inspect and make copies of all books, records and papers of such person, by or on whose behalf any solicitation is made:

(c) To investigate at any time the methods of making or conducting any such solicitation;

(d) To issue to all solicitors Information Cards which cards shall show:

(1) That same is issued as information for the public and is not an endorsement;

(2) The Board may, pursuant to Ordinance No. 34982, omit above provision and state that they endorse such charitable association:

(3) The pertinent facts set forth in Notice of Intention required under Section 44.05 of this Article;

(4) Any additional information obtained as shall in the opinion of the Board be of assistance to the public to determine the nature and worthiness of the purpose for which the solicitation is made;

(e) To charge a fee for supplying Information Cards, at the rate of four cents per card; provided that when more than twenty-five cards are issued at one time for the same solicitation, the fee for all such cards in excess of twenty-five shall be one cent per card.

[6] Sec. 44.12. Solicitation—Information Card:

No person shall solicit any contributions unless he exhibits an Information Card provided for in Sec. 44.03 of this Article and reads it to the person solicited or presents it to said person for his perusal, allowing him sufficient opportunity to read same, before accepting any contribution so solicited.

It is incumbent upon persons soliciting contributions for charity by means of receptacles in certain specified publicly owned and controlled places to secure the express written permission of the Board of Social Service Commissioners (44.09(a)[7]); and anyone making such solicitations by means of recepticlas in certain other places open or accessible to the public is required to file a "notice of intention" as required by section 44.05. 44.09(b).)

The ordinance is designed to protect the public from fraud and deception in the solicitation of funds for charity and to provide the public with information from which it may determine the nature and worthiness of the charitable purpose for which the collection is made. The regulatory provisions apply to all charitable solicitations, and though collections made solely for missionary, evangelical and other religious purposes are exempted therefrom, it is clear that the intent is to regulate charitable solicitations whether or not they are part of a religious program. In the Gospel Army case, supra,[7a] page 232, we held that the prior restraint thus imposed does not contravene the liberties guaranteed by the First Amendment.

In Reynolds v. United States, 98 U. S. 145, 164 (25 L. Ed. 244), Chief Justice Waite, in commenting upon a statement of Thomas Jefferson concerning the meaning of the First Amendment, to the effect "that the legislative powers of the government reach actions only, and not opinions,"

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[7] Sec. 44.09. (As amended by Ordinance No. 84,121, approved Feb. 5, 1941.) SOLICITATION—BOXES—RECEPTACLES.

(a) No person shall solicit any contribution for any purpose by means of any box or receptacle, upon any public street, sidewalk or way, or in any public park or in any publicly owned or controlled place, except by the express written permission of the Board.

(b) No person shall solicit any charitable contribution, or any contribution for any real or purported charitable purpose, by means of any box or receptacle in any place immediately abutting upon any public sidewalk or way, or in any place of business open to the public, or in any room, hallway, corridor, lobby or entranceway, or other place open to or accessible to the public, or in any place of public resort, without first filing with the Department a "notice of intention" as required by Sec. 44.05, and every person so soliciting must in all other respects comply with the provisions of this Article.

[7a] Advance Report Citation: 27 A. C. 246.

said: "Coming as this does from an acknowledged leader of the advocates of the measure, it may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured. Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or suversive of good order." Mr. Justice Roberts in Cantwell *v.* Connecticut, 310 U. S. 296, 303-304 (60 S. Ct. 900, 84 L. Ed. 1213, 128 A. L. R. 1352), restated the rule in clear and simple language, as follows: "Thus the Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society."

(11) There can be no question, therefore, that a person is free to hold whatever belief his conscience dictates, but when he translates his belief into action he may be required to conform to reasonable regulations which are applicable to all persons and are designed to accomplish a permissible objective. Gospel Army *v.* City of Los Angeles, supra,[7b] p. 232.)

Petitioners allege that Murdock was charged with having violated sections 44.09 and 44.12 of the Charities and Relief Ordinance.

Section 44.12, requiring a solicitor to exhibit an information card to the person solicited, was approved in the Gospel Army case, supra,[7c] page 232. We held in that case that information cards issue automatically upon the filing of the required information and the payment of the four cents for each card, and that the department is without authority to withhold such cards when the requirements are met. What we said there disposes of petitioners' contentions here with respect to the validity of the charge against Murdock based on this provision.

(12) We had no occasion in the Gospel Army case, however, to give specific consideration to section 44.09 which underlies the other charge pending against Murdock. Subdivision (a) of this section makes it incumbent upon per-

[7b, 7c] Advance Report Citation: 27 A. C. 246.

sons soliciting contributions for charitable purposes by means of receptacles in certain specified publicly owned or controlled places to secure the express written permission of the board. It is well known that religious and charitable organizations frequently use receptacles to collect money from individuals in public places. It is obvious that it would be exceedingly difficult to obtain contributions in congested areas if the solicitor had to present each person solicited with an information card. It is apparent also that it would be hard to enforce a requirement of that kind under such circumstances.

When section 44.09 (a) is read in the light of these circumstances and difficulties which give rise to the necessity for the requirement of a permit when contributions are to be solicited by receptacles, sufficient standards for the issuance of such permit are inherent in and follow from the reasons requiring it. While persons solicited by means of an information card are thereby sufficiently advised to discern any unfair or fraudulent scheme, passers-by solicited by means of receptacles have no similar chance of protecting themselves. Hence, if fraud appears from the information secured from those seeking to solicit by means of receptacles, the board should decline to issue a permit. Otherwise, solicitation by this method would secure financial support that unquestionably would be denied if the solicitation were made by use of an information card which disclosed the fraud to the persons solicited. In addition to protection against fraud, the requirement of a permit to solicit charitable contributions in public places by means of receptacles, assures protection with respect to the maintenance of the public convenience and safety for it is conceivable that solicitation by this method under some conditions would interfere with the free flow of traffic. We conclude, therefore, that if subdivision (a) of section 44.09 is read, as it must be, in light of the purpose and context of the entire ordinance, on the one hand, and the peculiar circumstances attendant upon collections by means of receptacles in public places, on the other hand, that the denial of a permit is warranted only if the information furnished to the board discloses fraud or if the solicitation as planned would interfere with the public convenience and safety. So

construed, the standards applicable to the granting of the permit are reasonable and the condition imposed by subdivision (a) does not prevent or unduly restrict the collection of funds. The requirement of the subdivision is not only reasonable but assures regulation without discrimination as to persons or causes. It may be added that the numerous other recognized methods of collecting funds are available to petitioner.

It is suggested that subdivision (a) imposes the same restraint as did the statute condemned in Cantwell *v.* Connecticut, 310 U. S. 296 (60 S. Ct. 900, 84 L. Ed. 1213, 128 A. L. R. 1352). That statute prohibited solicitation of money for religious, charitable or philanthropic causes without the approval of an administrative official. The ordinance challenged in this proceeding, however, is materially different from the statute involved in the Cantwell case. The statute there condemned empowered an administrative official to appraise the facts and to withhold permission to solicit if he determined the cause was not a religious one. The court held that to so limit the right of solicitation placed a forbidden burden upon the exercise of religious liberty.

It is clear, however, from what has been said before that the right to the permit required in subdivision (a) of section 44.09 does not depend upon a religious test. The board is not authorized or empowered to appraise the nature or worthiness of a religious cause or to deny a permit upon the ground that the cause is not a religious one. As before stated, the authority of the board is limited to regulating the issuance of permits for the solicitation of funds in the designated publicly owned or controlled places by means of receptacles for the sole purpose of preventing fraudulent practices and protecting the safety and convenience of the public. It is held in the Cantwell case that "a State may by general and non-discriminatory legislation regulate the times, the places, and the manner of soliciting upon its streets, and of holding meetings thereon; and may in other respects safeguard the peace, good order and comfort of the community; without unconstitutionally invading the liberties protected by the Fourteenth Amendment."
The general regulation, in the public interest, of solicita-

tion, which does not involve any religious test and does not unreasonably obstruct or delay the collection of funds, is not open to any constitutional objection, even though the collection be for a religious purpose. Such regulation would not constitute a prohibited previous restraint on the free exercise of religion or interpose an inadmissible obstacle to its exercise." (310 U. S. 304, 305.)

Subdivision (b) of the section relates to the solicitation of charitable contributions by means of receptacles in certain specified places not included in subdivision (a). In such cases the solicitor is required to give the "notice of intention" provided for in section 44.05. That section was approved in the Gospel Army case and for the reasons there stated the requirements of section 44.12 are valid.

Petitioners further contend that the ordinance is being unconstitutionally applied as to them. The allegations relied upon in support of this contention, however, are denied by the answer and the issues of fact thus presented will not be determined by us in this proceeding.

We conclude, therefore, that the provisions of the ordinance underlying the charges against Murdock are constitutional, and that in the absence of admitted or proven facts showing that the ordinance is being unconstitutionally applied, the alternative writ must be discharged and the peremptory writ must be denied. It is so ordered.

Shenk, *J.*, and Spence, *J.*, concurred.

Carter, *J.*, Dissenting:

I agree that the instant case is a proper one for review by a writ of prohibition but I cannot agree with the reasoning followed by the opinion of Chief Justice Gibson in arriving at that result.

It is fundamental that a court, whether it is a trial or appellate court, has the jurisdiction to determine its own jurisdiction. (In re Grove Street, 61 Cal. 438; Clary *v.* Hoagland, 6 Cal. 685; Cohen *v.* Barrett, 5 Cal. 195; In re Meisner, 30 Cal. App. 2d 290 (86 P. 2d 124); In re Wyatt, 114 Cal. App. 557 (300 P. 132); Fitzpatrick *v.* Sonoma County, 97 Cal. App. 588 (276 P. 113); In re Tassey, 81 Cal. App. 287 (253 P. 948); Dillon *v.* Dillon, 45 Cal. App. 191 (187

P. 27); (21 C. J. S., Courts 113). The general rule is stated in 21 Corpus Juris Secundum, Courts, section 113. "Every court has judicial power to hear and determine, or inquire into, the question of its own jurisdiction, both as to parties and as to subject matter, and to decide all questions, whether of law or fact, the decision of which is necessary to determine the question of jurisdiction." And as a necessary corollary to that proposition it has jurisdiction to decide the jurisdictional question wrongly as well as rightly. (Portnoy *v.* Superior Court, 20 Cal. 2d 375 (125 P. 2d 487); In re Bell, 19 Cal. 2d 488 (122 P. 2d 22); Truck Owners etc., Inc. *v.* Superior Court, 194 Cal. 146 (228 P. 19); Morehouse *v.* Superior Court, 124 Cal. App. 38 (12 P. 2d 133).) These things are conceded by the opinion of the chief justice but it goes on to say that once it has decided the question erroneously and is proceeding to exercise that jurisdiction it may be restrained by a higher court from exercising it; that at that stage jurisdiction to determine jurisdiction has been exercised, implying that thereafter the court does not have jurisdiction because it has decided erroneously, and hence one of the extraordinary writs for testing jurisdiction will lie. The fallacy in that reasoning lies in the assumption that at some stage in the proceeding the court suddenly steps from a possession of power to a lack of it when all of the time the basic question was present of whether or not it has jurisdiction. A court may determine its jurisdiction at any stage of the proceeding. It is always an issue before it. (Williams *v.* Sherman, 36 Idaho 494 (212 P. 971).) It is probably due to the thought that if a court has jurisdiction to decide its own jurisdiction correctly or incorrectly, its determination cannot be questioned by a jurisdictional writ, that leads to the idle distinction between power to determine power and the exercise of the power once a favorable determination is made. The issue need not be complicated in that fashion. It is simple. Of course a court has jurisdiction to decide its jurisdiction, and it may be right or wrong. In either event the jurisdictional writs lie to review its decision to ascertain whether the conclusion was correct. We are assuming that the court in making its decision is passing upon a question of jurisdiction. The question still remains one of jurisdiction

after the decision as well as before and hence the jurisdictional writs are available to review it. The higher court entertaining the writ may conclude that the lower court was correct in its result and deny relief or the opposite conclusion may be reached and relief granted.

Perhaps the reasoning in the majority opinion was adopted to escape the untenable position taken by the majority of this court in Portnoy *v.* Superior Court, supra. It was there stated, after declaring that a court had jurisdiction to determine jurisdiction (the constitutionality of a statute) erroneously: "In the present case both the justice's court and the superior court on appeal have held that the ordinance is constitutional, and it cannot be said that in so holding they had exceeded their jurisdiction." This statement is clearly contrary to the holding in the majority opinion in the case at bar. If, as conceded in the opinion of the chief justice, the issue of constitutionality goes to the jurisdiction of the court, then that issue is still present and the decision of the court on that issue was subject to review by certiorari. The issue thus boils down to the simple proposition that whenever a lower court decides a jurisdictional question its decision is subject to review by certiorari, prohibition, habeas corpus or other appropriate writ. That must be so because the question involved goes to the jurisdiction of the court. This does not mean that the lower court will not be given the opportunity to first decide the jurisdictional question. That is a matter of procedure—a matter of whether and when the higher court deems it wise to intercede—all of which is involved in the problem of whether other remedies are adequate. It does not involve the controversy of whether a jurisdictional question is present.

This brings us to the question of whether such a question is involved in the instant case, remembering that we are not concerned with the accuracy of the lower court's decision or its power to pass upon it. The constitutionality of a statute under which a court is acting goes to the jurisdiction of the court (Whitney *v.* Superior Court, 182 Cal. 114 (187 P. 12); Levy *v.* Superior Court, 105 Cal. 600 (38 P. 965, 29 L. R. A. 811)), and if it is unconstitutional, any order or judgment made or rendered pursuant thereto is void

and subject to collateral attack. The situation is not different than if the crime charged had been committed outside the territorial limits of the area over which the court had jurisdiction or was a crime which was within the exclusive jurisdiction of another court. In either case the lower court would have no jurisdiction to proceed with a prosecution and a higher court could issue a prerogative writ to stay such prosecution at any point. Antilla *v.* Justice's Court, 209 Cal. 621 (290 P. 431).

The ordinance involved is clearly unconstitutional. I have set forth in my dissenting opinion in Gospel Army *v.* City of Los Angeles,[8] 27 Cal. 2d 232, 250 (163 P. 2d 704), the reasons for that conclusion and I here repeat those views.

There are additional factors applying to the particular provision of the ordinance involved in the instant case, which render such provision invalid. The provision reads (44.09 (a)): "No person shall solicit any contribution for any purpose by means of any box or receptacle, upon any public street, sidewalk or way, of in any public park or in any publicly owned or controlled place, except by express written permission of the Board." The language is broad and comprehensive. Giving effect to all of its language as must be done in interpreting an ordinance, it clearly reaches solicitation on public property whether the receptacle is carried by the soicitor, and there is no obstruction of traffic, or is placed in or on the public place and is under the supervision of an attendant, or is left unattended. All three of those aspects of the solicitation are necessarily included in the wording and cannot be separated. If the provision is invalid as to one of them it is invalid as to all. Leaving aside for the instant the authority of the officials to give permission to solicit thereunder, that is, treating the clause as an absolute prohibition against soliciting on public property by use of a receptacle, it is clearly a violation of Murdock's right to freedom of religion. The solicitation of funds for the cause is a legitimate incident of the exercise of religious freedom. The exercise of that freedom even though receptacles are used

[8] 27 A. C. 246, 264.

cannot be wholly limited to places other than public property. In commenting on a statute stating that no child under certain ages shall sell any magazine or merchandise on any street or in any public place, the Supreme Court of the United States stated in Prince *v.* Massachusetts, 321 U. S. 158, 167 (64 S. Ct. 438, at page 443; 88 L. Ed. 645, 653): "Concededly a statute or ordinance identical in terms with Section 69, except that it is applicable to adults or all persons generally, would be invalid. Kim-Young *v.* California, 308 U. S. 147, 60 S. Ct. 146, 84 L. Ed. 155; Nichols *v.* Massachusetts, 308 U. S. 147, 60 S. Ct. 146, 84 L. Ed. 155; Jamison *v.* Texas, 318 U. S. 413, 63 S. Ct. 669, 87 L. Ed. 869; Murdock *v.* Pennsylvania, 319 U. S. 105, 63 S. Ct. 870, 87 L. Ed. 1292, 146 A. L. R. 81; Martin *v.* City of Struthers, 319 U. S. 141, 63 S. Ct. 862, 87 L. Ed. 1315." And later: "Street preaching, whether oral or by handing out of literature, is not the primary use of the highway, even for adults. While for them it cannot be wholly prohibited, it can be regulated within reasonable limits in accommodation to the primary and other incidental uses."

The fact that solicitation may be made under section 44.09 (a) by express permission of the public officials does not save it. Where a statute is void on its face, such as is true of subdivision (a), the mere fact that an official may give consent to the conduct does not cure it when, as far as appears, the discretion of the official is uncontrolled—is guided by no valid signposts and he may act arbitrarily. Nor need a permit be sought under such circumstances as a prerequisite to raising the constitutional question. (See Cantwell *v.* Connecticut, 310 U. S. 296 (60 S. Ct. 900, 84 L. Ed. 1213, 128 A. L. R. 1352); Schneider *v.* State, 308 U. S. 147 (60 S. Ct. 146, 84 L. Ed. 155); Hague *v.* C. I. O., 307 U. S. 496 (50 S. Ct. 954, 83 L. Ed. 1423); Lovell *v.* Griffin, 303 U. S. 444 (58 S. Ct. 666, 82 L. Ed. 949); Smith *v.* Cahoon, 283 U. S. 553 (51 S. Ct. 582, 75 L. Ed. 1264); cf. Cox *v.* New Hampshire, 312 U. S. 569, 577-578 (61 S. Ct. 762, 85 L. Ed. 1049, 133 A. L. R. 1396).)

There are no standards whatsoever which the enforcing officials must follow in determining whether the permit shall be issued. The legislative body has made no determination that traffic dangers are to be avoided or fraud

prevented. The refusal of the permit is not conditioned on any traffic hazard or obstruction or that the solicitor is engaged in a fraudulent scheme. In Hague v. C. I. O., 307 U.S. 496 (59 S. Ct. 954, 83 L. Ed. 1423), the issue was the validity of an ordinance which denied use of the streets without a permit giving no standards to the officials. The court said, at page 516: "It does not make comfort or convenience in the use of streets or parks the standard of official action. It enables the Director of Safety to refuse a permit on his mere opinion that such refusal will prevent 'riots, disturbances or disorderly assemblage.' It can thus, as the record discloses, be made the instrument of arbitrary suppression of free expression of views on national affairs, for the prohibition of all speaking will undoubtedly 'prevent' such eventualities. But uncontrolled official suppression of the privilege cannot be made a substitute for the duty to maintain order in connection with the exercise of the right." In the instant case, we have freedom to exercise one's religion—a right in the same class as freedom of speech. Here the ordinance does not make convenience or use of public streets a test for the standard of official action. The permit may be denied on the "mere opinion" of the official that fraud or traffic hazards may occur.

The note in 128 A. L. R. 1361 is illuminating: "While there is a conflict among the state court decisions as to the validity under the Fourteenth Amendment to the Federal Constitution of statutes or ordinances regulating the solicitation of contributions for charitable, religious, or individual purposes by prohibiting such solicitation without a license and providing that the licensing officer or body shall issue such a license only where he deems the applicant a worthy person and his cause a worthy or bona fide cause, it is not settled by decisions of the Supreme Court of the United States that such a statute or ordinance is void, since it authorizes a previous restraint upon the free exercise of the freedoms guaranteed by the Fourteenth Amendment by a licensing officer or body having no fixed standard for determining whether a license must be issued."

It is aptly said in Schneider *v.* State, 308 U. S. 147, 163 (60 S. Ct. 146, 84 L. Ed. 155): "It bans unlicensed communication of any views or the advocacy of any cause from door to door, and permits canvassing only subject to the power of a police officer to determine, as a censor what literature may be distributed from house to house, and who may distribute it. The applicant must submit to that officer's judgment evidence as to his good character and as to the absence of fraud in the 'project' he proposes to promote or the literature he intends to distribute, and must undergo a burdensome and inquisitorial examination, including photographing and fingerprinting. In the end, his liberty to communicate with the residents of the town at their homes depends upon the exercise of the officer's discretion." (See, also, Hoyt Bros. Inc. *v.* Grand Rapids, 260 Mich. 447 (245 N. W. 509).)

The only answer offered by the majority opinion to the lack of a standard for the issuance of permits is that (as a test for the denial of permits there must be either fraud or an interference with the public safety or convenience. There is no mention whatsoever of those tests in section 44.09(4). The board is given unlimited power in passing upon an application for a permit. The majority opinion by judicial legislation places those standards in the ordinance. This attempt to unearth vague and uncertain standards cannot stand in the face of this court's decision in In re Parterfield,[9] ante, p. — (168 P. 2d 706). This court there struck down an ordinance requiring a license (permit) to solicit, and quoted with approval from American Law Reports as follows (page[10] —): "A statute or ordinance which vests arbitrary discretion with respect to an ordinarily lawful business . . . in public officials, without prescribing a uniform rule of action, or, in other words, which authorizes the issuing or withholding of licenses . . . according as the designated officials arbitrarily choose, without reference to all of the class to which the statute or ordinance under consideration was intended to apply, and without being controlled or guided by any

[9] Advance Report Citation: Ante, p. 102.
[10] Advance Report Citation: Ante, p. 121.

definite rule or specified conditions to which all similarly situated might knowingly conform,—is unconstitutional and void." The court then went on to say (the ordinance there was much more explicit in its standards than in the instant case) that (p. 121) "It is to be noted that section 4 of the ordinance requires that application for a license be made in writing 'upon such forms as may be provided by said city council, a copy of which shall at all times be attached to said license.' The ordinance is utterly silent as to what the content of the forms shall be." No form whatsoever is provided in the case at bar. Continuing in the Porterfield case: "Section 6 provides that at the hearing to be held by the council on each application for a license, evidence shall be received of the good moral character of the applicant and whether or not he is likely to resort to force, violence, threat, menace, coercion, intimidation or corrupt means in his proposed work of solicitation. 'If the city council is satisfied that said applicant is of good moral character and will not resort to force, violence, threat, menace, coercion, intimidation or corrupt means in his proposed work of solicitation, it shall direct the issuance of a license to said applicant for said purpose of solicitation upon payment of the license fee herein provided for.'" In the case at bar there is no mention of moral character or character of a kind likely to indulge in violence, as a standard for issuing a permit. No standard whatever is set forth. Commenting on the terms of the ordinance there involved it is said in the Porterfield case (page[11] —): "We are of the opinion that on the face of the ordinance the indefinite standards which it enunciates provide a mechanism for the deprival of constitutional rights, not only on the basis of the guaranties applicable to free speech but also on the basis of those protecting the right to engage in lawful fashion in a lawful activity. It is pointed out by petitioner that the council members in the exercise of their power might very conceivably conclude that because of an applicant's labor union affiliations or because of his attitude upon controversial labor issues he did not have the prescribed qualities. It is entirely possible that

[11] Advance Report Citation: Ante, p. 122.

on occasion a majority of the council might be members of a rival labor union or they might be employers engaged in a controversy with the union represented by the applicant. Certainly the standard provided by section 6 of the Redding ordinance is entirely subjective. Each council member is left to determine in his own mind what is 'likely' to be the future conduct of the applicant. The character or extent of showing necessary to satisfy the council that the applicant is of good moral character and will not resort to the activities mentioned is not set forth. Satisfaction may be circumscribed by individual whim, caprice, or personal prejudice."

The ordinance in the case at bar cannot stand in the face of the tests applied in the Porterfield case. The ordinance involved in that case sought to place restrictions upon the constitutional right of freedom of speech. The ordinance in the case at bar seeks to restrict the constitutional right of freedom of religion. The ordinance in each case reposes in a board uncontrolled discretion to exercise arbitrary power in acting upon applications for permits to exercise such constitutional rights. The ordinance in the Porterfield case was held unconstitutional on that ground. It follows that the ordinance in the case at bar should likewise be held unconstitutional insofar as it trenches upon the constitutional right of petitioner herein.

In my opinion the writ should issue as prayed.

SCHAUER, *J.*

I concur in the conclusion reached by Mr. Justice Carter and in the discussion supporting his conclusion insofar as it relates to the constitutionality of the ordinance involved herein.

EDMONDS, *J.*

For the reasons stated by me in the Gospel Army case, I am of the opinion that section 44.09 of the Los Angeles ordinance, as well as the provisions which were considered in the prior proceeding, are unconstitutional. Accordingly, I join in the conclusion that the writ of prohibition should issue.